United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1504
76-1505

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

v.

WILLIAM R. BALOG, NICHOLAS V. LANESE,
RICHARD M. LANESE, APPELLANTS

UNITED STATES OF AMERICA, APPELLEE

v.

ROGER L. SPINELLI, JOHN J. DELUCIA,
APPELLANTS

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES

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76-1504

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v.

WILLIAM R. BALOG, NICHOLAS V. LANESE
and RICHARD M. LANESE, APPELLANTS

76-1505

UNITED STATES OF AMERICA, APPELLEE

v.

ROGER L. SPINELLI and JOHN J. DELUCIA,
APPELLANTS

ON APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether indictments (based upon evidence obtained from wire interceptions under court order) should have been dismissed under the Rules Regarding Prompt Disposition of Criminal Cases.

2. Whether wire interception applications were authorized by the Attorney General.

3. Whether the affidavits supporting the wiretap applications adequately explained why other investigative procedures would be unlikely to succeed.

4. Whether search warrants authorizing searches for physical evidence complied with the requirements of the Fourth Amendment.

RULES INVOLVED

The District of Connecticut's Plan for Achieving Prompt Disposition of Criminal Cases provides in pertinent part:

Rule 4:

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise, the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

Rule 5:

In computing the time within which the government should be ready for trial under rules 3 and 4, the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pretrial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

(b) The period of delay resulting from a continuance granted by the district court at the request of, or with the consent of, the defendant or his counsel. The district court shall grant such a continuance only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his right under these rules and the effect of his consent.

(c) The period of delay resulting from a continuance granted at the request of a prosecuting attorney if:

(i) The continuance is granted because of the unavailability of evidence material to the government's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or

(ii) the continuance is granted to allow the prosecuting attorney additional time to prepare the government's case and additional time is justified by the exceptional circumstances of the case.

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown and in addition he is attempting to avoid apprehension or prosecution or his location cannot be determined by due diligence. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

(f) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

(g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(h) Other periods of delay occasioned by exceptional circumstances.

STATEMENT

On June 27, 1972, an indictment returned in the United States District Court for the District of Connecticut charged appellants William Balog, Nicholas Lanese, Richard Lanese and seven others with conducting a gambling business in violation of 18 U.S.C. 1955 (App. 1-2). On the same date in the same district, a second indictment returned against Roger Spinelli, John J. DeLucia and twelve others charged them with a similar offense (App. 741). On September 13, 1976 appellants Balog, Nicholas Lanese, Spinelli and DeLucia pleaded nolo contendre and appellant Richard Lanese pleaded guilty as charged before Judge Zampano. Balog and Nicholas Lanese were sentenced to terms of two years' imprisonment, all but three months of which was suspended, with two years' probation. Richard Lanese was sentenced to two years' imprisonment, all of which was suspended, with two years' probation. Spinelli and DeLucia were each sentenced to imprisonment for one year, all but three months of which was suspended, with two years' probation.[1/] In addition thereto the following fines were imposed: Balog--$5,000, Nicholas Lanese--$7,500, Richard Lanese--$3,000, Spinelli--$2,000, and DeLucia--$1,000. For each appellant execution of sentence was stayed pending appeal. In entering their

1/ As to the seven others charged in the first indictment, four pleaded guilty and three others pleaded nolo contendre. As to the fourteen others charged in the second indictment, the indictment was dismissed as to seven, six pleaded guilty and one pleaded nolo contendre.

pleas, appellants reserved the right to appeal any pretrial rulings (App. 829, 838).

The government's case was derived from a wire interception conducted under a court order issued on December 16, 1971, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The appellants were advised of this wire interception as required by 18 U.S.C. 2518(8)(d) and (9). The rulings which the appellants claim as error in this appeal relate primarily to a denial of a motion to dismiss alleging a violation of the Rules Regarding Prompt Disposition of Criminal Cases[2/] and the legality of the wire interception. The facts relating to these issues are briefly summarized as follows:

On December 15, 1971, Attorney General John Mitchell initialed a memorandum to Acting Assistant Attorney General Henry Peterson, requesting Peterson to communicate to Special Attorney John Tarrant that Mitchell had authorized Tarrant to apply for a court order authorizing a wiretap. Peterson notified Tarrant by letter that he was so authorized to proceed. On December 16, 1971 Judge Blumenfeld issued a wiretap order. From

2/ Appellants in No. 76-1505 claim that the government consumed more than six months in violation of the time restriction of the Rules For Prompt Disposition of Criminal Cases and that the government was not ready for trial when it filed its Notice of Readiness. Appellants in No. 76-1504 must prevail on the latter claim.

December 17, 1971 until December 20, 1971 three telephone lines were electronically intercepted and appellants were served with inventory notice of the interception on March 10, 1972. On the basis of evidence gathered from the wiretap, Special Agent Danny Steinke applied for and was issued search warrants authorizing the search of each appellant's and their codefendants' premises for evidence used in gambling operations. (App. 18, 196-210, 488, 789-811).

On June 27, 1972, appellants were indicted and, two days later, they were arrested. Thereafter in No. 76-1505 appellants Spinelli and DeLucia filed certain pretrial motions including a motion to suppress physical evidence and a motion for discovery and inspection on August 8, 1972 and August 14, 1972 respectively. The motion to suppress was contingent on the validity of the wiretap since the intercepted conversations provided probable cause for the issuance of the search warrant which led to the evidence appellants initially sought to suppress. In the discovery motion appellants sought to discover Henry Peterson's role in authorizing the wiretap and also to discover the evidence derived from the wire interception. On October 24, 1972 the district court ruled the suppression motion "off without prejudice," postponing argument on that motion until defense counsel had an opportunity to review tapes of the intercepted telephone conversations. On March 6, 1973 the district court again ruled

the suppression motion "off without prejudice". On March 23, 1973, the Supreme Court granted certiorari in United States v. Giordano, 416 U.S. 505 (1974) and United States v. Chavez, 416 U.S. 562 (1974), which involved issues pertinent to the validity of the wiretap in this case. On June 29, 1973 appellant Spinelli filed a motion to take the deposition of Henry Peterson and John Mitchell and a motion to discover the method of selecting an Acting Assistant Attorney General. On November 12, 1973, on the motion of the government with the consent of appellants (App. 721-723), 3/ the district court stayed proceedings pending resolution of Giordano and Chavez. At that hearing on that date the Court granted the request of defense counsel "to waive the so-called six months rule as it has been implemented by the rules of this district" (App. 724). On May 28, 1974, fifteen days after the Supreme Court decided Giordano and Chavez, the government filed its Notice of Readiness for trial. (App. 147-154, 510, 724a, 727-738).

In 76-1504, appellants Balog, and Nicholas and Richard Lanese filed pretrial motions on August 15, 1972. That same day their codefendants Levin, Gordon and Mastro filed a Motion to Suppress Evidence derived from the wire interception. On March 6, 1973 the district court decided certain pretrial motions and ruled

3/ At the same time, the district court denied Spinelli's motion to inspect grand jury minutes which had previously been ruled "off without prejudice" on October 24, 1972.

the above suppression motion "off without prejudice." As to the defendants in No. 76-1504, the district court stayed proceedings on June 28, 1973 pending resolution of Giordano and Chavez. On May 28, 1974 after the Supreme Court decided Giordano and Chavez, the government filed its Notice of Readiness for trial (App. 841-851).

On January 8, 1975 the government filed a Motion to Compel Voice Exemplars. On July 10, 1975 appellants in both cases filed a consolidated Motion to Dismiss the Indictments alleging denial of a speedy trial; said motion was denied on March 15, 1976. Appellants thereafter filed motions to suppress both the physical evidence seized and the intercepted conversations, all of which were denied. Following plea negotiations, appellants entered their respective pleas on September 13, 1976 (App. 733-737).

In denying the motion to dismiss the indictment the district court specifically found that pretrial motions were pending throughout the period from August 8, 1972 until November 12, 1973 and that the government was in fact ready for trial when it filed its Notice of Readiness on May 28, 1974 (App. 510-511, 514). In denying appellants' motion to suppress evidence derived from the wiretap, the district court found that the application was properly authorized in the Department of Justice.

I

THE DISTRICT COURT PROPERLY REFUSED TO DISMISS THE TWO INDICTMENTS UNDER THE PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES

Appellants in these two cases were prosecuted along with others (10 defendants were charged in No. 76-1504 and 16 were charged in 76-1505) for conducting gambling businesses in violation of 18 U.S.C. 1955. The government's evidence against them derived primarily from a wire interception order which was authorized in December 1971, a period of time in which the procedures followed within the Department of Justice in authorizing and submitting wire interception applications to federal courts did not fully satisfy the statute. See United States v. Giordano, 416 U.S. 505 (1974) and United States v. Chavez, 416 U.S. 562 (1974) where after granting certiorari on March 26, 1973 the Supreme Court ruled on the validity of these procedures on May 13, 1974. Although appellants press a claim that the wire interception order was invalid because of an alleged defect in the authorization procedure, appellants Spinelli and DeLucia in No. 75-1505 argue that delay during the time that Giordano and Chavez were pending in the Supreme Court resulted in a violation of the six month period provided by the Plan for Achieving Prompt

Disposition of Criminal Cases and required the dismissal of their indictment.[4/] In addition, all appellants argue that the government was not ready for trial when it filed its Notices of Readiness on May 28, 1974, fifteen days after the decisions in Giordano and Chavez, because it subsequently filed motions on January 8, 1975 to compel appellants to furnish voice exemplars.[5/]

We submit that the principles behind the plans for prompt disposition of criminal cases set forth in Hilbert v. Dooling, 476 F.2d 355 (2nd Cir. 1973), cert den., 414 U.S. 878 were not violated in these cases. As we argued in the district court (App. 773-784, 598) and as we argue below, the suppression issue - the legality of the wiretap - was the keystone issue which was in actuality pending during 1973 while Giordano and Chavez were pending and that the entire period of delay claimed was tolled under Rule 5(a),(b) (e) and (h) of the Plan. We also

4/ Spinelli claims unwarranted delay between March 20, 1973 until June 29, 1973 (101 days) and between July 23, 1973 until November 12, 1973 (112 days). DeLucia claims a delay between March 20, 1973 and November 12, 1973 (251 days).

5/ The claim of appellants in No. 76-1504 is dependent on the readiness issue since the delay they raise from March 6, 1973 until June 8, 1973 (113 days) when added to other periods of time does not extend beyond six months.

argue that the Government was ready when the Notices of Readiness were filed. We submit, therefore, that there is no reason to upset the conclusion of the district court that the delay was justified, that there was an understanding that additional motions to suppress would be filed, and that the Government was ready for trial when it filed its notices (App. 508-514, 519-520, 525-527).

A. The Government Was Ready For Trial On The Date It Filed Its Notices Of Readiness

We start with appellants' claim attacking the Notices of Readiness which were filed on May 28, 1974, a claim that is crucial to the argument of appellants Balog, Richard Lanese and Nicholas Lanese since they only charge delays of 173 days in 1972 and 1973 to the filing of the notices. Of course the "crucial date for stopping the accumulation of days chargeable against the government when computing the six month period is the date the government communicates its Readiness to the court." United States v. Flores, 501 F.2d 1356, 1358 (2nd Cir. 1974). See United States v. Pierro, 478 F.2d 386, 389 (2nd Cir. 1973); United States v. Favaloro, 493 F.2d 623 (2nd Cir. 1974). The Notice of Readiness gives the defendants "the opportunity to request trial at once" and the government cannot be faulted with their failure to do so. United States v. Cannif, 521 F.2d 565, 572 (2nd Cir. 1975), cert. den., sub nom. Benigno v. United States, 423 U.S. 1059.

As the government pointed out below, the government sought voice exemplars, not because they were needed in order to make a case against appellants but in order to expedite the trial (App. 308). As the prosecutor said (App. 779-780).

> . . . there are many ways in which the government may offer proof of identity in this type of case; circumstantial evidence, such as toll call records, pen register records, subscriber information and surveillances; direct testimony, such as the testimony of a witness who is familiar with the voice of the speaker; and self identification by the speaker during a conversation, to name the more prominent examples. Voice comparison is but one more means by which the government can attempt to sustain its burden at trial.
>
> The government, in this case, was prepared, subsequent to May 28, 1974, to use some, if not all, of the above mentioned methods at trial. However, it was subsequently decided that the additional method of comparing known voice exemplars to taped conversations should also be employed. The decision was made, to be sure, so the government could present the best possible case at trial, but also because the use of voice comparison is an efficient time saving method in terms of the length of trial. Voice comparison can also work to the advantage of the defendant since if no conclusion could be reached when the comparison was made this fact would become Brady material.

The court below accepted this representation, (App. 514), and none of the arguments advanced by appellants merits a rejection of its finding. See United States v. Wolfish, 525 F.2d 457, 460-461 (2nd Cir. 1975) cert. den., 423 U.S. 1059, where this Court rejected a contention that a Notice of Readiness was a sham because subsequent to its filing, the government moved for the production of hand writing exemplars.

Appellants cite United States v. Pollak, 474 F.2d 828 (2nd Cir. 1973), on remand 364 F. Supp. 1047 (S.D.N.Y. 1973), aff'd 492 F.2d 1237 for the mistaken proposition that the motion for voice exemplars nullified the Notice of Readiness. There the government had not yet complied with a discovery order when it filed its Notice of Readiness. This court held that although the failure to comply with the discovery order was not dispositive of the issue of the government's readiness, the case should be remanded to the district court for a determination of whether the government was in fact ready on that date because the record revealed no specific finding. Unlike Pollak, as we have pointed out, however, the district court here made a finding of fact that the government was ready to proceed to trial without the voice exemplars on the date it filed its notices (App. 514).

Finally the government's October 18, 1974 letter to Judge Zampano does not indicate that the notices were insincere (App. 263). This letter states that the government considered that these cases were like Chavez, supra and the trials should go forward.[6/] In short, the letter affirms the government's good

6/ The text of the letter follows:

The Spinelli (H-299) and Balog (H-298) cases have been held in abeyance pending the decisions in Giordano and Chavez. The Supreme Court has ruled, and we feel that the cases, based on the facts, fall under the Chavez decision. On this basis, we felt that the cases should go forward. In order to expedite matters, we would request that a conference be scheduled between all the parties in the hope that any remaining questions or problem areas can be resolved.

faith in seeking the prompt disposition of appellants' case.

B. The Delay Between March 20, 1973 And The Stays Entered For The Giordano And Chavez Cases Was Justified.

We now turn to the complaint that delays between March 20, 1973 and November 12, 1973 caused a violation of the Plan for Prompt Disposition of Criminal Cases.

1. In 1972 and 1973, it was common practice in cases involving wire interception orders for defendants to attack the internal procedures used in the Department of Justice for authorizing the submission of applications for such orders to a district judge. See e.g. United States v. Pisacano, 459 F.2d 259 (2nd Cir. 1972), vacated 417 U.S. 903; United States v. Becker, 461 F.2d 230 (2nd Cir. 1972), vacated 417 U.S. 903; United States v. Robinson, 468 F.2d 189, 472 F.2d 973, (5th Cir. 1973); United States v. Roberts, 477 F.2d 57 (7th Cir. 1973) cert. den., 417 U.S. 918; United States v. King (9th Cir. 1973) cert. den., 417 U.S. 920; United States v. Mantello, 478 F.2d 671 (D.C. Cir. 1973) cert. den., 417 U.S. 920; United States v. Cox, 462 F.2d 1293 (8th Cir. 1972) cert. den., 417 U.S. 918. And, as we pointed out above, in Giordano and Chavez, the Supreme Court granted certiorari to review these procedures on March 26, 1973 and ruled on their validity on May 13, 1974. In Giordano, it held that the Executive Assistant to the Attorney General, Sol Lindenbaum, could not authorize a wiretap. In Chavez, it ruled

that the misidentification of the Assistant Attorney General as the person authorizing a wiretap, when the Attorney General himself actually gave the approval, was no justification for suppression of evidence. We now show that the attack on the wiretap evidence in the Spinelli-DeLucia case was in actuality pending and had not been abandoned both on March 20, 1973 when they say that the delays in 1973 first began and on the other subsequent dates in 1973. While a similiar argument can be made in the Balog case, the charged delay of 173 days makes such a showing unnecessary.

In August 1972 Spinelli filed a motion for a Bill of Particulars, a Motion to Inspect Grand Jury Minutes and to Extend Time in Which to Move to Dismiss, and motions for Discovery and Inspection, for Suppression of Evidence and Return of Seized Property and for Severance. DeLucia joined in similiar motions filed by co-defendant Varvella including a motion to dismiss. Other defendants also filed similar motions (App. 728). At a hearing on September 25, 1972, the district court reserved decision on the Bill of Particulars and Discovery motions and deferred decisions on other motions. On October 11, 1972 Spinelli filed an amended discovery motion. On October 24, 1972 the district court again held a hearing on the motions, reserving decision on Spinelli's discovery motion and ruling that all

other motions were "off without prejudice", including the Motions to Suppress physical evidence (App. 729-730). On this occasion the Giordano-Chavez issue arose with one defense attorney requesting affidavits from Executive Assistant to the Attorney General Sol Lindenbaum, Assistant Attorney General Henry Petersen, and former Attorney General John Mitchell (App. 153).

On March 6, 1973, the district court decided certain of the motions filed by the defendants, ruling certain motions including the motions to suppress evidence" off without prejudice" (App. 730). On that date the court also granted Spinelli a two week extension of time until March 20, 1973 to file a motion to dismiss. No such motion was filed on that date and on June 29, 1973 Spinelli filed a motion for discovery and inspection; he also asked leave to take depositions of Assistant Attorney General Henry Petersen and of former Attorney General Mitchell, who was then under indictment in the Southern District of New York. 7/ At a hearing on July 23, 1973 the district court ordered the government to attempt to secure from Petersen and Mitchell hand writing exemplars as an alternative to Spinelli's requested depositions. (July 23 Tr. 17-18). Thereafter on November 12, 1973, with the consent of the appellants Spinelli and DeLucia,

7/ Mitchell was charged on May 10, 1973 in an indictment returned in the Southern District of New York with conspiracy to obstruct justice, endeavoring to obstruct justice and with making false statements. He was acquitted on April 28, 1974 following a jury trial. See Stans v. Gagliardi, 485 F.2d 1290 (2nd Cir. 1973).

the district court stayed proceedings pending resolution of the Giordano and Chavez cases in the Supreme Court.[8/]

2. The Rules and Plan exclude certain time periods when computing the six months allotted to the government to prepare for trial under Rule 4. The good cause reasons for delay include periods of time when pretrial motions are pending, periods during which matters are sub judice, delays at the request of the defendant, delays resulting from a joinder for trial with codefendants and other periods of delay occasioned by exceptional circumstances. See Rule 5(a),(b),(e) and (h). In ruling the suppression, dismissal and discovery motions either "off without prejudice" or in reserving decision on such motions, the court in effect found the delay was justified both as delay at the request of the defense and as delay because of pretrial defense motions.

The conclusion that we urge is supported by what occurred at the hearings on motions on October 24, 1972 and on November 12, 1973. On the former occasion, the court postponed argument on appellants' suppression motion, ruling the motion "off without prejudice" until the fruits of the wiretap were examined by the defense (App. 145-154; Tr. 50). It did so

8/ Earlier in June 28, 1973 in the Balog et al. case, a similar stay had been granted.

because the recorded conversations obtained from the wiretap provided the probable cause for the search warrant which was the subject of the motion to suppress physical evidence. As we noted, the Giordano-Chavez issue also arose at this time with one defense attorney requesting affidavits from Executive Assistant to the Attorney General Sol Lindenbaum, Assistant Attorney General Henry Petersen, and former Assistant Attorney General John Mitchell (App. 153).

Significantly at the November hearing, appellant Spinelli's attorney agreed with the court when it said that the motion for discovery and inspection including the request for depositions of Petersen and Mitchell was still pending (App. 711-712).[9/] Spinelli's attorney also indicated that a motion

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9/ The record shows the following :

THE COURT: . . . Now, this motion for discovery and inspection, what is left open on that?

* * *

MR. ROSNICK: Well, if your Honor please, there are two things that remain open--well, three things, actually: handwriting exemplars of Mr. Petersen and initial exemplars from Mr. Mitchell and, also, the procedure by which the Department determines the ranking of First Assistant and Second Assistant in the Department of Criminal Justice.

to dismiss raising an authorization issue was still pending (App. 715, 720).[10] As Judge Zampano subsequently pointed out (in ruling on the motion to dismiss that is now being reviewed), he was trying to avoid taking the deposition of John Mitchell at that time (App. 511). The latter was under indictment in 1973.

Indeed, on November 12, 1973 defense counsel stated that they did not intend to rely on the plan (App. 724a):

> MR. FLYNN: [Counsel for DeLucia]: Your Honor, for the Court's--protection of the Court, I believe the Second Circuit rule could be interpreted by some other lawyer at some other time to have some effect on my representations. For the record I respectfully ask the Court permission to waive the so-called sixth months rule as it has been implemented by the rules of this district.
>
> THE COURT: I assume that necessarily follows. Is that agreeable to all counsel?

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[10] In the colloquy, the court and defense counsel stated:

> MR. ROSNICK: When the motion to dismiss eventually comes before the court--which I suspect that it will--at that time we will subpoena Mr. Mitchell and Mr. Petersen to discover the factual situation on the authorization.
>
> * * *
>
> THE COURT: . . . I will give counsel seven days to file briefs on all motions pending. If there are no briefs on all motions, they are going to be stricken for failure to obey the Court's order. Now, I mean briefs on everything that is pending: motions to dismiss, motions to suppress, motions for discovery and inspection, motions for stay of proceedings, motions to reconsider.

MR. BROPHY: Yes, Your Honor.

MR. ROSNICK [Counsel for Spinelli]: Yes.

THE COURT: Very well

The very fact that counsel for Spinelli and DeLucia were willing to waive the six month rule on November 12, 1973, is evidence that they too were acting under the assumption that certain pretrial motions were pending or sub judice throughout the period prior to the November 12th hearing and that, as of that date, six months had not yet run against the government.[11]

In addition the colloquy between the court and counsel for co-defendant Piazza also shows that pretrial motions ruled "off without prejudice" on March 6, 1973 were still pending at the November 12, 1973 hearing.[12] The following dialogue at this

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11/ This statement can also be interpreted as a waiver of a claim that there were unwarranted delays during this period. Cf. United States v. Favaloro, 493 F.2d 623, 626 (2nd Cir. 1974); United States v. Fernandez, 480 F.2d 726, 729 (2nd Cir. 1973).

12/ At the very least, Piazza qualifies under Rule 5(e) as "a codefendant as to whom the time for trial has not run". Nor can appellant argue on this score that the government or the court should have sua sponte severed his case prior to November 12, 1973 from Michael Piazza's. In United States v. Cangiano, 491 F.2d 906, 909 (2nd Cir. 1974) cert. den., 419 U.S. 904, this court held that "it is unrealistic to expect the Government to take the initiative to move for a severance." See United States v. Lasker, 481 F.2d 229, 234 (2nd Cir. 1973), cert. den., 415 U.S. 975. Lasker, supra, also held that the government need not apply for an exclusion under Rule 5 before time has run as to one of the defendants "since by definition any Rule 5 exclusion period is not to be included in the six month period." In Lasker, supra, the six month period had not run as to one of Lasker's codefendants under Rule 5(f) and therefore had not run as to Lasker either. (Footnote cont'd.)

hearing indicates such motions were pending and were awaiting completion of discovery (App. 710):[13]

MR. BROPHY: [Counsel for the Piazzas]: There are still several motions from everybody before the Court--for suppression of evidence and to dismiss and it seems to me that this Court can well study these cases and come to that opinion also and make a decision.

THE COURT: Now let's get that squared away. What is pending now for decision? The motion to dismiss? is there a motion to dismiss?

MR. BROPHY: There is a motion--I have motions to suppress that are still pending, I have motions to dismiss that are still pending.

THE COURT: When you say still pending--

MR. BROPHY: They have not been heard.

THE COURT: They have not been argued?

MR. BROPHY: No, Your Honor.

THE COURT: Why not? Why have they not been put down for argument?

MR. BROPHY: I assume we were waiting for discovery to be finished.

12/ (Footnote cont'd.)
Here the six month period had not clearly run as to Michael Piazza under Rule 5(a) and likewise should not have run as to appellants.

13/ At the end of the November 12, 1973 hearing when the court granted a stay of all proceedings pending resolution of Giordano and Chavez, the court also used the terms "stay" and "off without prejudice" interchangeably (App. 724-724a):

THE COURT: Now, Mr. Flynn [Counsel for DeLucia], I assume, since it was your suggestion, that you still stick with "all other motions should be stayed?"

(Footnote cont'd.)

But even more fundamentally, there were extraordinary circumstances that justified the delay. Until Giordano and Chavez were decided by the Supreme Court, the issues of the validity of the wiretap - at the heart of the pretrial motions-could not be definitively resolved.

In these circumstances, it would be unrealistic to conclude that appellants abandoned their motions, or that the pretrial motions had been resolved. In short, there was good cause for delay under Rule 5 of the Plan and the court below was correct in finding that the delays were justified.

13/ (Footnote cont'd.)

THE COURT: Very well. All motions may go off without prejudice for the reasons stated in open court until Chavez and Giordano are decided.

THE WIRETAP APPLICATION WAS AUTHORIZED BY THE ATTORNEY GENERAL

Appellants contend that evidence derived from the wiretap order should have been suppressed, claiming that the application for the order authorizing the interception allegedly was not authorized by either the Attorney General or a specially designated Assistant Attorney General as required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520.[14] Here, authorization for the wiretap application had in fact been given by Attorney General John Mitchell although the interception application and order incorrectly stated that approval had been given by then Acting Assistant Attorney General Henry Petersen (App. 197, 199, 207-209). Mitchell's initialed memorandum to Peterson was in fact the authorization for the wiretap application and Petersen's letter to Special Attorney John Tarrant merely notified Tarrant that the Attorney General had authorized the application . See affidavits of John Mitchell and Henry Petersen (App. 207-209). This case is thus factually similar to United States v. Chavez, 416 U.S. 562 (1974).

14/ 18 U.S.C. 2516(1) provides in pertinent part:

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception

(Footnote cont'd.)

The only difference between Chavez and the present case is that in Chavez the interception order stated incorrectly that the application had been authorized by an Assistant Attorney General and in the instant case the interception order stated incorrectly that the application had been authorized by an Acting Assistant Attorney General.[15] However, in both cases the application clearly had been authorized by the Attorney General himself. In cases factually identical to the present case the courts of appeals have applied Chavez and denied the suppression on the grounds that Peterson's act of notifying the Special Attorney was "ministerial." United States v. Swann, 526 F.2d 147 (9th Cir. 1975) cert. den., ___U.S.___; United States v. Vigi, 515 F.2d 290 (6th Cir. 1975) cert. den., 423 U.S. 912;

14/ (Footnote cont'd.)
of wire or oral communications by the Federal Bureau of Investigation. . . .

15/ Recently, in United States v. Donovan, U.S. , No. 75-212, decided January 18, 1977 slip op. at 19, 21, the Supreme Court summarized the Chavez decision as follows:

> Chavez concerned the statutory requirement that the application for an intercept order specify the identity of the official authorizing the application....The Court concluded that mere misidentification of the official authorizing the application did not make the application unlawful within the meaning of §2518(10)(a)(i) since that identification did not play a "substantive role" in the regulatory system. 416 U.S. at 578.
>
> * * *
>
> The Chavez intercept was lawful because the Justice Department had performed its task of prior approval. . . .

United States v. Acon, 513 F.2d 513 (3rd Cir. 1975); United States v. Robertson, 504 F.2d 289 (5th Cir. 1974) cert. den., 421 U.S. 913; United States v. Boone, 499 F.2d 557 (4th Cir. 1974) reversing 348 F. Supp. 168.[16/]

Nor are appellants entitled to an evidentiary hearing on the authenticity of John Mitchell's initialed memorandum since Mitchell, Petersen and Sol Lindenbaum, Mitchell's executive assistant, each swore in affidavits that Mitchell did in fact authorize the wire interception application in this case and appellants "have shown no more than a general suspicion about [its] authenticity." (App. 207-209, 768). United States v. Losing, 539 F.2d 1174, 1179 (8th Cir. 1976). See also United States v. John, 508 F.2d 1134, 1138 (8th Cir. 1975) cert. den., 421 U.S. 962.

16/ In support of their argument, appellants rely in United States v. Calellero, 503 F.2d 1018 (6th Cir. 1974) and United States v. Focarile, 340 F. Supp. 1033 (D. Md. 1972) aff'd. 469 F.2d 522, aff'd. 473 F.2d 906, cert. den., 411 U.S. 952 both of which are factually similar to United States v. Giordano, 416 U.S. 505 (1974). Indeed, Focarile and Giordano were codefendants. In those cases the Attorney General did not authorize the wire-taps and therefore they have no applicability here.

III

THE AFFIDAVIT SUPPORTING THE WIRETAP APPLICATION EXPLAINED WHY OTHER INVESTIGATIVE PROCEDURES WOULD BE UNLIKELY TO SUCCEED AND THEREFORE MET THE REQUIREMENTS OF 18 U.S.C. 2518(1)(C).

The wiretap statute in 18 U.S.C. 2518(c) requires

> . . . a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. . .

This section requires "that the agents inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods." United States v. Hinton, 543 F.2d 1002, 1011 (2nd Cir. 1976). We submit, contrary to appellants contention, that the affidavit of Special Agent Steinke supporting the wiretap application gave a detailed account of the procedures that he employed in investigating this gambling operation and a statement explaining why those measures were insufficient to garner the necessary evidence to successfully prosecute the participants or to discover the full scope of the operation. It also stated why other untried procedures were unlikely to succeed.

Steinke's affidavit included the following (App. 211-222): (1.) a detailed account of the gambling operation from three confidential sources; (2.) the results of an investigation

on the registration of the telephone lines sought to be intercepted; (3.) the results of an unproductive physical surveillance of the premises suspected to be the site of the operation and of appellants' movements; (4.) a statement that the informants, though granted immunity, refused to testify and that without their testimony the case would be difficult to prove; (5.) statements that search warrants would probably not produce evidence which would disclose all of the participants in the operation or the scope of the operation and that gambling paraphernalia is usually destructible; (6.) that there were no known witnesses who could truthfully testify; and (7.) that further physical surveillance would be ineffective because the suspected premises were multiple apartment dwellings in which it would be difficult to observe appellants and other participants using the phones. This affidavit satisfied the demands of Hinton. Steinke set forth the evidence already gathered from his lengthy investigation and then explained why the wiretap was necessary to insure a successful prosecution.

Appellants suggest that undercover agents should have been used to infiltrate the operation. But in a gambling operation of this size it is unlikely that agents could have infiltrated to an extent which would enable them to obtain incriminating evidence on more than a few participants. These cases

closely resemble United States v. Vento, 533 F.2d 838, 849 (3rd Cir. 1976):

> That the government's application did not mention the use of undercover agents, as defendants stress, is not controlling. In this situation an undercover agent would be incapable of providing the Strike Force with information about the full extent of the criminal operations unless placed in constant touch with Gregorio and his closest confederates: Undercover agents are not readily insinuated into a conspiracy and may be exposed to unusual danger. The circumstances here do not require that the government justify its failure to plant a spy in the midst of Gregorio's enterprise.

This court has recognized the difficulty of proving the "negative" of why other investigative procedures would fail. United States v. Steinberg, 525 F.2d 1126, 1130 (2nd Cir. 1975) cert. den., 425 U.S. 971. The government had no witnesses who would testify, it conducted an unproductive physical surveillance and traced the registration of the telephone lines used for placing bets. "Viewing this affidavit in a practical and common sense fashion" Judge Blumenfeld "could reasonably conclude that investigative procedures other then wiretaping would be unlikely to succeed." United States v. Schwartz, 535 F.2d 160, 163 (2nd Cir. 1976). See United States v. Daly, 535 F.2d 434, 439 (2nd Cir. 1976).[17/]

17/ Appellants rely on United States v. Kalustian, 529 F.2d 585 (9th Cir. 1975) which held that an affidavit may not be wholly conclusory but should explain why other investigative means would probably fail. Although we feel that the affidavit here meets the Kalustian standard, Kalustian does not reflect the law of
(Footnote cont'd.)

IV

THE SEARCH WARRANTS FOR PHYSICAL EVIDENCE COMPORTED WITH THE FOURTH AMENDMENT

Appellants allege that the search warrants authorizing searches for physical evidence of the gambling operations were deficient in four respects; (a) they did not specify with sufficient particularity the objects to be seized; (b) the supporting affidavit contained inconsistent statements, (c) the reliability of one informant was not adequately demonstrated and (d) the warrants were the fruit of the wiretap. Each of these contentions is without merit.

a. Each search warrant named the following as evidence to be seized (App. 488):

> . . . gambling records and wagering paraphernalia and evidence of a criminal offense in violation of the laws of the United States, including but not limited to, betting slips and records, account sheets and books, line and price sheets and notations, sports information papers and schedules, slips and books, lists of code names, financial statements, and United States Currency.

Appellants argue that the warrants could have been more specific

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17/ (Footnote cont'd.)
this or any other circuit. See, Steinberg, supra; United States v. James, 494 F.2d 1007, 1015-16 (D.C. Cir), cert. den., 419 U.S. 1020 (1974); United States v. Armocida, 515 F.2d 29, 38 (3rd Cir. 1975), cert. den., 423 U.S. 858; United States v. Schaefer, 510 F.2d 1307, 1310 (8th Cir.), cert. den., 421 U.S. 978 (1975); United States v. O'Neill 497 F.2d 1020, 1025 (6th Cir. 1974).

because evidence obtained from the wiretap should have enabled the agents to give a more precise account of that which they expected to find. But "[w]hen circumstances make an exact description of instrumentalities . . . a virtual impossibility, the search officer can only be expected to describe the generic class of items he is seeking [citations omitted]." United States v. Scharfman, 448 F.2d 1352, 1355 (2nd Cir. 1971) cert. den., 405 U.S. 919.[18] By overhearing the wagers via the wiretap, the agents had no way of knowing precisely what materials appellants used to record bets or to determine odds. Recently in Andresen v. Maryland, U.S. , 96 S.Ct. 2737, 2748-2749 (1956) the Supreme Court ruled that a search warrant was not "rendered fatally 'general'" by the inclusion of the phrase, "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." That phrase is far broader than the language used in the warrants here which we submit satisfies the Fourth Amendment .

b. Appellants point to three places in the affidavit to the search warrants where Agent Steinke, the affiant, when discussing the substance of the intercepted conversations, identifies either Nicholas or Richard Lanese as the speaker

18/ United States v. Marti, 421 F.2d 1263 (2nd Cir. 1970), cited by appellants, dealt with a warrant authorizing a search for "obscene materials", without defining "obscene". This court applied a more stringent test there, where First Amendment freedoms were involved. See Scharfman, supra, at 1354.

although the tape transcripts furnished by the government refer to the speaker as "UM" or unidentified male (App. 796-797). At the suppression hearing, appellants' counsel stated that "we are not attempting to make the argument that Agent Steinke [sic] at all prejured himself or engaged in a fraud." (July 19, 1976 transcript, p. 15). At the very least appellants must make an "initial showing of falsehood prerequisite to a hearing on the veracity of an affidavit." Mapp v. Warden, 531 F.2d 1167, 1173 (2nd Cir. 1976) cert. den., 397 U.S. 1002, See, United States v. Dunnings, 425 F.2d 838, 840 (2nd Cir. 1969). Appellants have made no showing that Agent Steinke did not correctly identify the speakers in these three instances. That the tape transcripts refer to the speaker as "UM" does not render Steinke's conclusion false. In any event, the affidavit makes several other references to Nicholas and Richard Lanese and their participation in the gambling operation which appellants do not challenge (App. 789-800). Thus, the affidavit, when taken as a whole, still established probable cause for the searches of their premises and appellants were not entitled to a hearing on the affidavit's veracity.

c. Appellants attack the reliability of a confidential informant who provided information because the affidavit states that he supplied information on more than two hundred occasions although his tips had led to only two arrests (App. 793).

Reliability of an informant can be demonstrated not only through past history but also through corroboration. United States v. Canestri, 518 F.2d 269 (2nd Cir. 1975); Spinelli v. United States, 393 U.S. 410, 417-418 (1969); Draper v. United States, 358 U.S. 307 (1959). In this case the informant's detailed account of the gambling operation was fully corroborated by the evidence obtained from the wiretap (App. 793-807). Hence, his reliability was more than sufficiently demonstrated.

d. Finally, appellants assert that the search warrant was the fruit of an illegal wiretap and that the evidence derived from the warrant should have been suppressed. The legality of the wiretap is discussed in Issues II and III, pp. 23-28. For the reasons stated therein, the wiretap was lawfully authorized and did not taint the search warrant.

CONCLUSION

For the foregoing reasons it is respectfully submitted the convictions should be affirmed.

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CERTIFICATE OF SERVICE

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